A **CIMB BANK BHD v. SEBANG GEMILANG SDN BHD & ANOR**

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP CJ (MALAYA)
HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
B ZAHARAH IBRAHIM FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 02(f)-2-01-2015(C)]
8 FEBRUARY 2018

C ***CONTRACT:*** *Assignment – Deed of assignment – Failure to give notice in writing pursuant to s. 4(3) of Civil Law Act 1956 – Whether assignee of debt prevented from proceeding with action – Whether there was valid equitable assignment – Liability of debtor to assignee of debt – Whether debtor liable to assignee for debt under assignment – Whether debtor liable to third party for debt where debtor made*
D *payment to customer – Whether debtor merely acted in accordance with normal banker-customer relationship – Whether payment of monies to customer done dishonestly – Whether debtor dishonest based on ordinary standards*

This was an appeal by CIMB Bank Bhd ('the appellant') against the decision of the Court of Appeal in affirming the decision of the High Court allowing
E Sebang Gemilang Sdn Bhd's ('the first respondent') claims against the appellant for general damages for negligence, breach of trust and breach of contract. The first respondent's claims were based on a deed of assignment granted by Hamidi Tech Sdn Bhd ('the second respondent') to the first respondent. The appellant had part financed some Government projects that
F were awarded to the second respondent. As an additional security for the financing, a sinking fund was created where 5% of the proceeds of the Government contracts were deposited into the sinking fund account. The account was operated solely by the appellant. The second respondent was unable to complete the said projects and then executed a deed of assignment
G and a power of attorney in favour of the first respondent so as to enable the first respondent to complete the projects. The first respondent successfully completed the projects. Upon the second respondent's request, the appellant closed the sinking fund account and credited the fixed deposit to the second respondent's current account upon repayment of the loan. After the expiry
H of the defects liability period, the first respondent approached the appellant for the release of the monies accumulated in the sinking fund. The first respondent then discovered that the sinking fund account had been closed and the monies had been paid out to one Hamidi Hamid, the owner of the second respondent. The first respondent then sued both the appellant and the second respondent and claimed for various reliefs. The High Court, *inter alia*, held
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that when the appellant released the monies in the sinking fund to Hamidi Hamid without informing the first respondent, the appellant had breached its fiduciary duty as a trustee of the monies and was also negligent in doing so. The Court of Appeal affirmed the High Court's decision. Leave was given to the appellant by this court to appeal against the decision of the Court of Appeal on the following questions of law (i) where there was no written notice of an absolute assignment pursuant to s. 4(3) of the Civil Law Act 1956 ('CLA'), was the debtor liable to the assignee for the debt under the assignment; (ii) where there was no written notice of an absolute assignment pursuant to s. 4(3) of the CLA, and the trial court made a finding that the debtor had knowledge of an assignment between its customer and third party, could the debtor be held liable to that third party for the debt where the debtor had made payment of the same to its customer; and (iii) where the creditor had assigned the benefit of funds in a fixed deposit account to a third party, could mere knowledge of the identity of the signatories to a current account, constitute notice of an assignment to the debtor.

Held (allowing appeal)
Per Hasan Lah FCJ (for the majority):

(1) A failure to give a notice in writing pursuant to s. 4(3) of the CLA will not prevent an assignee from proceeding with its action on the basis that it is an equitable assignee. Based on the facts and circumstances of the instant case, there was a valid equitable assignment of the monies in the sinking fund to the first respondent. Further, there was no reason to disagree with the findings of the High Court and the Court of Appeal that the appellant had knowledge of the assignment of the contracts by the second respondent to the first respondent. The answer to the first question of law posed was in the affirmative. (paras 36, 37, 42 & 48)

(2) It requires more than knowledge of facts to make the conduct wrongful. It requires a dishonest state of mind, and that is to say, consciousness that one is transgressing ordinary standards of honest behaviour. The appellant had merely acted in accordance with the normal banker-customer relationship when it closed the sinking fund and paid the monies to the second respondent. Without other evidence, this court was unable to say that the appellant was dishonest based on the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when closing the sinking fund and paid the monies to the second respondent. The second question of law was thus answered in the negative as it had not been shown that the payment of the monies to its customer was done dishonestly. (paras 47 & 48)

(3) In regards to the third question, this court found it unnecessary to answer. (para 48)

Per Abu Samah Nordin FCJ (dissenting):

(1) The deed of assignment was valid as an equitable assignment and the absence of notice in writing as required by s. 4(3) of the Act did not affect its validity. The assignment could be held to be binding from the time it had notice of it. For the assignee's title to be effective against the debtor, notice must therefore be given, though no consent or acquiescence on the part of the debtor was necessary. In the circumstances of this case, the deed of assignment which was personally given by PW1 to DW1 was valid as an equitable assignment. Thus, the answer to the first question was in the affirmative. (paras 80-82 & 84)

(2) The appellant's contention that the monies in the sinking fund had been released to the second respondent before the appellant had knowledge of the deed of assignment was without merit. It was a question of fact when payment was made. The trial court had made a specific finding of fact that the appellant had knowledge of the deed of assignment and had it in its possession before the monies in the sinking fund were released to the second respondent. The Court of Appeal, therefore, did not err in affirming the decision of the trial court. There were no valid reasons to interfere with the finding of the trial judge. (paras 86-88)

(3) The submission that there must be evidence of dishonesty before a constructive trustee could be held liable was wholly irrelevant to the questions put to this court. The appellant's submission that it could not be held liable in absence of a finding of dishonesty was only confined to the first respondent's claims against the appellant as a constructive trustee for breach of trust. Thus, even if the appellant succeeded on this issue, it did not absolve the appellant from liability in negligence in releasing the monies in the sinking fund to the second respondent. Therefore, the answer to the second question was in the affirmative, notwithstanding that payment had been made by the debtor to its customer. A debtor who makes payment to a third party after having knowledge of the assignment does so at his own peril. (paras 105 & 106)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan oleh CIMB Bank Bhd ('perayu') terhadap keputusan Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi membenarkan tuntuan Sebang Gemilang Sdn Bhd ('responden pertama') terhadap perayu untuk ganti rugi am untuk kecuaian, pelanggaran amanah dan pelanggaran kontrak. Tuntutan responden pertama berdasarkan surat ikatan penyerahhakan yang diberi oleh Hamidi Tech Sdn Bhd ('responden kedua') kepada

responden pertama. Perayu telah membiayai sebahagian beberapa projek Kerajaan yang diawardkan kepada responden kedua. Sebagai sekuriti tambahan untuk kewangan, satu dana jaminan diwujudkan di mana 5% daripada hasil kontrak Kerajaan didepositkan ke dalam akaun dana jaminan. Akaun itu dikendalikan sepenuhnya oleh perayu. Responden kedua tidak dapat menyelesaikan projek-projek tersebut dan telah melaksanakan satu surat ikatan penyerahhakan dan surat kuasa wakil memihak pada responden pertama untuk membolehkan responden pertama menyelesaikan projek-projek itu. Responden pertama berjaya menyelesaikan projek-projek itu. Atas permintaan responden kedua, perayu menutup akaun dana jaminan dan mengkreditkan deposit tetap ke akaun semasa responden kedua atas pembayaran balik pinjaman. Selepas tamat tempoh liabiliti kecacatan, responden pertama meminta daripada perayu pelepasan wang yang dikumpulkan dalam dana jaminan. Responden pertama kemudiannya mendapati bahawa akaun dana jaminan telah ditutup dan wang telah dibayar kepada seorang yang bernama Hamidi Hamid, pemilik responden kedua. Responden pertama seterusnya menyaman kedua-dua perayu dan responden kedua dan menuntut beberapa relif. Mahkamah Tinggi, antara lain, memutuskan bahawa semasa perayu melepaskan wang dalam dana jaminan tanpa memberitahu responden pertama, perayu telah melanggar kewajipan fidusiari sebagai pemegang amanah wang itu dan cuai dalam berbuat demikian. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Kebenaran diberikan kepada perayu oleh mahkamah ini atas persoalan-persoalan undang-undang berikut (i) di mana tiada notis bertulis penyerahhakan penuh menurut s. 4(3) Akta Undang-Undang Sivil 1956 ('AUS'), adakah penghutang bertanggungjawab kepada pemegang serah hak untuk hutang bawah penyerahan hak; (ii) di mana tiada notis bertulis penyerahhakan penuh bawah s. 4(3) AUS, dan mahkamah perbicaraan membuat dapatan bahawa penghutang mempunyai pengetahuan penyerah hak antara pelanggan dan pihak ketiga, adakah penghutang bertanggungjawab kepada pihak ketiga untuk hutang di mana penghutang telah membuat bayaran yang sama kepada pelanggan; dan (iii) di mana pemiutang telah serahkan manfaat dana dalam akaun deposit tetap kepada pihak ketiga, adakah pengetahuan identiti penandatangan-penandatangan kepada akaun semasa, membentuk notis penyerahan hak kepada penghutang.

Diputuskan (membenarkan rayuan)
Oleh Hasan Lah HMP (keputusan majoriti):

(1) Kegagalan memberikan notis bertulis menurut s. 4(3) AUS tidak akan menghalang seorang penerima hak dari meneruskan tindakannya atas dasar bahawa ia adalah pemegang serah hak saksama. Berdasarkan fakta-fakta dan keadaan kes ini, terdapat penyerahhakan berekuiti yang sah wang dalam dana jaminan kepada responden pertama. Tambahan, tiada

A alasan untuk mahkamah ini untuk tidak bersetuju dengan dapatan-dapatan Mahkamah Tinggi dan Mahkamah Rayuan bahawa perayu mempunyai pengetahuan penyerahhakan kontrak oleh responden kedua kepada responden pertama. Jawapan kepada soalan undang-undang pertama dijawab secara afirmatif.

B **(2)** Ia memerlukan lebih daripada pengetahuan fakta-fakta untuk membuatkan sesuatu kelakuan salah. Ia memerlukan keadaan fikiran tidak jujur, dan itu bermakna, kesedaran yang seseorang itu melanggar standard biasa kelakuan yang jujur. Perayu hanya bertindak menurut hubungan bank-pelanggan biasa apabila ia menutup dana jaminan dan
C membuat bayaran wang kepada responden kedua. Tanpa keterangan lain, mahkamah ini tidak dapat menyatakan bahawa perayu tidak jujur berdasarkan standard biasa orang yang munasabah dan jujur, dengan pengetahuan, berdasarkan ujian subjektif tidak jujur, bahawa apa yang dilakukannya adalah tidak jujur apabila menutup dana jaminan dan
D membuat bayaran kepada responden kedua. Soalan undang-undang kedua dengan itu dijawab secara negatif kerana ia tidak dapat dibuktikan bahawa bayaran wang kepada pelanggan telah dilakukan dengan tidak jujur.

(3) Berhubungan soalan ketiga, mahkamah ini mendapati bahawa ia tidak
E perlu dijawab.

Oleh Abu Samah Nordin HMP (menentang):

(1) Surat ikatan penyerahhakan adalah sah sebagai penyerahhakan berekuiti dan ketidakhadiran notis bertulis seperti yang diperlukan oleh s. 4(3)
F Akta tidak menjejaskan kesahihannya. Penyerahhakan boleh diputuskan sebagai mengikat daripada masa ia mengetahui berkenaan notis itu. Untuk hak milik pemegang serah hak menjadi efektif terhadap penghutang, notis dengan itu harus diberikan, walaupun tiada kebenaran atau persetujuan pihak penghutang diperlukan. Dalam keadaan kes ini,
G surat ikatan penyerahhakan yang telah diberikan oleh PW1 kepada DW1 adalah sah sebagai penyerahhakan berekuiti. Oleh itu, jawapan kepada soalan pertama dijawab secara afirmatif.

(2) Hujahan perayu bahawa wang dalam dana jaminan telah dilepaskan kepada responden kedua sebelum perayu mempunyai pengetahuan surat
H ikatan penyerahhakan adalah tanpa merit. Adalah soalan fakta bila bayaran dibuat. Mahkamah perbicaraan telah membuat dapatan fakta yang spesifik bahawa perayu mempunyai pengetahuan surat ikatan penyerahhakan dan memilikinya sebelum wang dalam dana jaminan dilepaskan kepada responden kedua. Mahkamah Rayuan, oleh itu, tidak
I terkhilaf dalam mengesahkan keputusan mahkamah perbicaraan. Tiada alasan yang sah untuk campur tangan dengan dapatan hakim bicara.

(3) Hujahan bahawa harus terdapat keterangan ketidakjujuran sebelum pemegang amanah konstruktif boleh dikatakan bertanggungjawab tidak relevan langsung dengan soalan-soalan yang dikemukakan di mahkamah ini. Hujahan perayu bahawa ia tidak bertanggungjawab kerana tiada dapatan ketidakjujuran hanya terhad pada tuntutan responden pertama terhadap perayu sebagai pemegang amanah konstruktif untuk pelanggaran amanah. Oleh itu, walaupun perayu berjaya dalam isu ini, ia tidak membebaskan perayu daripada liabiliti kecuaian dalam melepaskan wang dalam dana jaminan kepada responden kedua. Dengan itu, soalan kedua dijawab secara afirmatif, walaupun bayaran telah dibuat oleh penghutang kepada pelanggan. Seorang penghutang yang membuat bayaran kepada pihak ketiga selepas mengetahui terdapatnya penyerahhakan melakukannya atas risikonya sendiri.

Case(s) referred to:

AmBank (M) Bhd v. Luqman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***
Barlow Clowes International Ltd (in liquidation) and Others v. Eurotrust International Ltd and Others [2006] 1 All ER 333 ***(refd)***
CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
In re Lord Southampton's Esate, Allen v. Lord Southampton [1880] 16 Ch D 178 ***(refd)***
Jones v. Gibbons 9 Ves 410 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***
S Mariappan v. The Government of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC ***(refd)***
Twinsectra v. Yardley [2002] 2 All ER 377 ***(dist)***
UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***
William Brandt's Sons & Co v. Dunlop Rubber Co Ltd [1905] AC 454 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 18 r. 8

Judicature Act 1873 [UK], s. 25(6)
Law of Property Act 1925 [UK], s. 136(1)

Other source(s) referred to:

Anson's Law of Contract, 28th edn, p 475
Halsbury's Law of England, 5th edn, para 24
Halsbury's Law of England, 28th edn, paras 28, 41, 47

A *For the appellant - K Shanti Mogan & Hee Hui Ting; M/s Shearn Delamore & Co*
For the 1st respondent - R Kamalanathan & Vinod R Kamalanathan; M/s Vinod Kamalanathan & Assocs

[Editor's note: For the Court of Appeal judgment, please see CIMB Bank Bhd v. Sebang Gemilang Sdn Bhd & Anor [2015] 7 CLJ 870 (overruled).]

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Hasan Lah FCJ:

C **Introduction**

[1] In the High Court, the first respondent sued the appellant as the first defendant and the second respondent as the second defendant for breach of contract and for breach of trust and various other causes of action.

D **[2]** After the full trial, the High Court found for the first respondent and allowed the claim and ordered an inquiry to be held to determine the amount of money that was in the sinking fund in the account of the second respondent in the appellant's bank which was due to the first respondent based on the deed of assignment and a power of attorney granted to the first respondent by the second respondent and awarded RM500,000 as general damages against the appellant and RM100,000 as general damages against second respondent.

[3] Dissatisfied with the decision of the High Court, the appellant appealed to Court of Appeal against the whole decision, and on 28 August F 2014 the Court of Appeal dismissed the appeal with costs.

[4] On 6 January 2015, this court granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions of law:

(a) Where there is no written notice of an absolute assignment pursuant to s. 4(3) of the Civil Law Act 1956, is the debtor liable to the assignee G for the debt under the assignment;

(b) Where there is no written notice of an absolute assignment pursuant to s. 4(3) of the Civil Law Act 1956, and the trial court make a finding that the debtor has knowledge of an assignment between its customer and H third party, can the debtor be held liable to that third party for the debt where the debtor has made payment of the same to its customer;

(c) Where the creditor has assigned the benefit of funds in a fixed deposit account to a third party, can mere knowledge of the identity of the signatories to a current account, constitute notice of an assignment to the I debtor.

Background Facts

[5] The second respondent was the appellant's customer since 5 April 1994. The appellant part financed three Government projects awarded to the second respondent.

[6] As additional security for the financing, a sinking fund was created, where 5% of the proceeds of the Government contracts were deposited into the sinking fund account. The account was operated solely by the appellant.

[7] The second respondent was unable to complete the said three projects. The second respondent then executed a deed of assignment and a power of attorney, both dated 19 September 2003, in favour of the first respondent so as to enable the first respondent to complete the projects.

[8] On 6 May 2004, the second respondent made an application to the appellant to add one Amiruddin bin Ahmad, a director of the first respondent, as another signatory to its current account with the appellant. Before that, the only signatory to the said account was Mohd Hamidi bin Dato' Haji Abd Hamid, the owner of the second respondent.

[9] On 20 May 2004, the second respondent passed a board resolution to approve a change in the authorised signatures in respect of its current account.

[10] The first respondent completed the projects.

[11] On 11 July 2005, upon the second respondent's request, the appellant closed the sinking fund account and credited the fixed deposit to the second respondent's current account upon repayment of the loan.

[12] On 20 December 2006, the second respondent passed another resolution to remove Amiruddin bin Ahmad as the signatory to its current account. On 22 December 2006 a copy of the resolution was given to the appellant.

[13] After the expiry of the defects liability period, the first respondent approached the appellant for the release of the monies accumulated in the sinking fund. The first respondent then discovered that the sinking fund account had been closed and the monies had been paid out to Mohd Hamidi.

[14] The first respondent then sued both the appellant and the second respondent and claimed for various reliefs.

Findings Of The High Court

[15] The High Court, *inter alia,* held that based on the evidence, the appellant had knowledge of the deed of assignment, the power of attorney and the second respondent's resolution dated 20 May 2004 and PW1 (the

first respondent's director) had personally handed over a copy of the deed of assignment and the power of attorney to DW1 (the appellant's manager). Pursuant to the two documents, the first respondent had a right to the monies in the sinking fund when the projects were completed and the defects liability period was over. When the appellant released the monies in the sinking fund to Hamidi without informing the first respondent, the appellant had breached its fiduciary duty as a trustee of the monies and was also negligent in doing so.

[16] The High Court also held that the appellant owed a duty of care towards the first respondent who was its customer and the first respondent suffered damage as a result of the appellant's action.

Findings Of The Court Of Appeal

[17] The Court of Appeal, in affirming the High Court's decision, held as follows:

(a) The deed of assignment was capable of constituting a valid assignment under s. 4(3) of the Civil Law Act 1956 notwithstanding the requirement of written notice was not met. It would be an equitable assignment and the assignor, the second respondent, was made a party to the proceedings.

(b) The appellant had knowledge of the assignment. The first respondent's witness oral testimony and the second respondent's resolution adding a signatory, Amiruddin bin Ahmad to the second respondent's current account as well as the appellant's internal office memorandum, purportedly addressed to 'Amiruddin' were sufficient to make the appellant aware of the assignment.

(c) The appellant had knowledge of the assignment and therefore committed a breach of trust. The case of *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1 was not applicable as in that case the Federal Court found no cogent evidence to prove dishonesty on the part of CIMB.

The Appellant's Submissions

[18] Under s. 4(3) of the Civil Law Act 1956, one of the pre-conditions to a valid assignment is that an express notice in writing must be given to the debtor. It was the contention of learned counsel for the appellant that by reason of its banker-customer relationship with the second respondent, the appellant was obliged to pay the second respondent, the original debtor, until and unless the written notice under s. 4(3) of the Civil Law Act 1956 was given.

[19] As regards the finding of the Court of Appeal that there was an equitable assignment which was based on the decision in *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369 it was submitted that that was not the position at common law. Learned counsel submitted that the *Scotch Leasing* case did not support the proposition as suggested by the Court of Appeal that the first respondent could proceed with an action against the appellant after the appellant had paid the debt to the second respondent.

[20] As regards the case of *UMW Industries (1985) Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379; [1996] 1 MLJ 365, which was also referred to by the Court of Appeal, learned counsel for the appellant submitted that in that case, there was a written notice of assignment given. The Federal Court, by way of *obiter*, held that the assignee may proceed with its action on the basis that it was an equitable assignee in which case the court may require the assignee to be made a party to the proceedings. However, in the instant case, the debt had already been paid to the assignee at the time the suit was commenced.

[21] On the issue of knowledge of the assignment where both the courts below held that there was knowledge of the assignment on the part of the appellant, learned counsel submitted that knowledge was irrelevant because without a written notice pursuant to s. 4(3) of the Civil Law Act 1956, the appellant was entitled and even legally obliged to release the money to the second respondent.

[22] It was also submitted that the knowledge of the assignment was imputed on the appellant by the High Court from PWI's testimony, the change of signatory of the second respondent's current account with the appellant on 20 May 2004 and the appellant's memoranda dated 25 June 2003, 15 August 2003 and 19 August 2003 addressed to one Aminuddin. It was contended that none of these events imputed the appellant with notice sufficient to render its release of the money in the sinking fund to the second respondent open to challenge.

[23] Finally, it was submitted that following the Federal Court case of *CIMB Bank Bhd*, it is insufficient for the appellant to be imputed with "constructive knowledge" of assignment and therefore be liable to the first respondent under the assignment. Case law requires "dishonesty" according to the test in *Twinsectra v. Yardley* [2002] 2 All ER 377 in order for the appellant to be liable for the debt under the assignment.

Submissions Of The First Respondent

[24] With regard to the issue of the written notice under s. 4(3) of the Civil Law Act 1956, learned counsel for the first respondent submitted that the issue was not pleaded by the appellant in its defence. The issue was only raised at the Court of Appeal stage. As such, the appellant cannot raise the

issue before this court. In support of that, learned counsel cited the cases of *AmBank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] 3 MLJ 1 and *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141.

[25] As regards the issue of the equitable assignment, learned counsel for the first respondent submitted that based on the decision of this court in *Scotch Leasing,* the Court of Appeal's decision was right. In *Scotch Leasing,* it was held that the validity of an equitable assignment was not affected by any failure to comply with requirements under s. 4(3) of the Civil Law Act 1956.

[26] On the issue of whether the appellant had knowledge of the deed of assignment and the power of attorney granted to the first respondent by the second respondent, learned counsel submitted that this was a question of fact already decided by both the High Court and the Court of Appeal.

[27] On the facts of this case, it was submitted that both the High Court and the Court of Appeal are correct in their findings that there was a breach of trust by the appellant and there arose the issue of trust because of the knowledge on the part of the appellant of the deed of assignment and the power of attorney. It was also submitted that the Court of Appeal was right in distinguishing the facts of this case from those in the *CIMB Bank Berhad* case.

The Non-Giving Of The Notice In Writing Under s. 4(3) Of The Civil Law Act 1956

[28] I shall deal first with the first respondent's submission that the issue was not pleaded by the appellant in its defence. The answer to this is that under the rules of pleading, only the facts and not the law are to be pleaded unless the matter must be specifically pleaded pursuant to O. 18 r. 8 of the Rules of the High Court 1980.

[29] I find that the observations made by the court in the following two cases relating to the issue whether effect should be given to a point not raised at the trial but was raised for the first time in the appellate court are relevant. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 at p. 534, the Court of Appeal made the following observation:

> … In my judgment, the categories of cases in which an appellate Court will admit a new point are not closed. The governing principle is this: an appellate Court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

> Viewed from this standpoint, the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed. Similarly, justice would, in the usual way, favour the admission of a point that goes to the jurisdiction of the trial Court because neither consent nor waiver may confer jurisdiction where none exists: and it is not in the interests of justice that a judgment of a Court lacking jurisdiction should be permitted to stand.
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> In the present appeal, weighing all the relevant considerations on a scale, it was the unanimous decision of this Court that the balance of justice favoured the respondents.

In *S Mariappan v. The Government of Malaysia* [1983] 2 CLJ 124; [1983] CLJ (Rep) 382; [1983] 2 MLJ 340, the Federal Court said:

> In *Gulwant Singh v. Abdul Khalik* (7) Thomson L.P. delivering the judgment of the court referred to *The "Tasmania"* and went on to say that "The question of whether effect should be given to a point not raised at the trial and which is raised for the first time in the appellate Court is one for discretion and the principles on which that discretion will be exercised have been set out by Lord Watson in his judgment in *Connecticut Fire Insurance v. Kavanagh* (8) as follows:
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> > When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea.

[30] What is more important in this case is that the parties had argued the issue before the Court of Appeal and the Court of Appeal had decided on the issue. In fact, two of the three questions of law granted by this court for this appeal are specifically on the written notice pursuant to s. 4(3) of the Civil Law Act 1956.

[31] I, therefore, find no merit on the respondents' contention on this issue.

[32] Section 4(3) of the Civil Law Act 1956 reads as follows:

A (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would B have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

C That provision had been considered by this court in *UMW Industries Sdn Bhd* where the following observation was made at pp. 383-384 (CLJ); pp. 370-371 (MLJ):

We have considered s. 4(3) of the Civil Law Act 1956 referred to by D counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge E only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the F assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus in *Curran v. Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA), Jenkins LJ dealing with s. 136(1) of the Law of Property G Act 1925 (English) the equivalent of which in our law is s. 4(3) of the Civil Law Act 1956, said: (at p 299 F-H)

It is, no doubt, true that s. 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly H postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

I

[33] In *UMW Industries Sdn Bhd*, the notice was given more than two years after the execution of the deed of assignment. At p. 384 (CLJ); pp. 371-372 (MLJ) of the judgment, this court held that:

> Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, no law prescribing any limit of time within which notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action, eg a guarantor. All that the said s. 4(3) requires is that 'express notice in writing' be given. Hence, notice may be given after the death of the assignor (*Re Westerton, Public Trustee v. Gray* [1919] 2 Ch 104), or after the death of the assignee (*Bateman v. Hunt* [1904] 2 KB 530 (CA). Notice, however, must be given before the assignee takes out its writ (*Compania Colombiana de Seguros v. Pacific Steam Navigation Co* [1965] 1 QB 101 at pp. 127-129); *but even then, failure to do so will not prevent the assignee from proceeding with its action on the basis that it is an equitable assignee in which case the court may require the assignor to be made a party to the proceedings.* In our case presently under appeal, notice was given before the action was commenced.
>
> …
>
> There remains the question whether the late notice of assignment given by the assignee has in any way affected the rights of the assignee to remedies against the guarantor. Express notice in writing under the said s. 4(3) is required to be given so as: (i) a legal title to the property assigned may be acquired; (ii) to establish the priority of competing assignments if any (see eg *Marchant v. Morton, Down & Co* [1901] 2 KB 829); and (iii) to prevent the debtor or guarantor in our present case paying and thereby getting a good discharge for the payment from his original creditor. It must be noted that payment to the creditor will be a good satisfaction of the debt or claim, notwithstanding it may have been assigned, if the debtor or guarantor has no notice of the assignment (*Stocks v. Dobson* (1853) 4 De GM & G 11; *Lord Southampton's Estate, Allen v. Lord Southampton, Banfather's Claim* (1880) 16 Ch D 178). (emphasis added).

[34] In the instant case, the Court of Appeal held that the failure of the first respondent to give express notice pursuant to s. 4(3) of the Civil Law Act 1956 did not prevent the first respondent from proceeding with its action on the basis that the first respondent was an equitable assignee and the second respondent had been made a party to the proceedings.

[35] In *Public Finance Bhd*, the Federal Court opined at p. 649 (CLJ); p. 381 (MLJ) as follows:

> At common law (in the special sense now of its being distinguished from rules in equity) contractual rights, eg as to debts, were not assignable, ie transferable to another person without the consent of both parties to the contract conferring such contractual rights. Equity stepped in and has long allowed such assignment of such debts to another person who is not privy

A to the contract in respect of such debts, without at all the consent of the debtor: see eg *Brice v. Bannister* (1878) 3 QB 569; and even without notice to the debtor, see *Kelly v. Selwyn* [1905] 2 Ch 117 and *Ward v. Duncombe* [1893] AC 369. Such assignments as so allowed by equity are called – 'equitable assignments'.

B The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s. 4(3) of the Civil Law Act 1956, for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly, irrespective of whether the chose in action is an equitable chose in action C or a legal chose in action (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the 'statutoriness' of such an assignment, *ipso facto*, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment: eg see *E Pfeiffer* D *Weikellerei-Weinenkauf GmbH & Co v. Arbuthnot Factors Ltd* [1988] 1 WLR 150.

We need to say a few words more about the great desirability of giving notice of assignment of a debt by an assignee to the debtor, even though absence of such notice does not affect the validity of the equitable assignment as between the assignor and E *the assignee. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor.* This rule means that, by extension, even if the assignor assigns once more the debt to another person in fraud or otherwise on the earlier assignee, and that other person gives notice to the debtor; and if the debtor pays that other person or the second assignee, then the earlier assignee must still give credit to the debtor for F his payment thus, for the debtor cannot be blamed for doing lawfully in ignorance of the title of the earlier assignee who has failed to give notice of the assignment to the debtor. Notice to debtor is for the protection of the assignee himself. It is this effect of what the debtor does lawfully as described that dims the view of the true role of the *nemo dat* rule in the resolution of disputed claims to a same debt. The money paid to the G 'second assignee' can, of course, be recovered by the earlier assignee on the *nemo dat* principle. (emphasis added)

[36] It is clear from the decisions in the two cases cited above that a failure to give a notice in writing pursuant to s. 4(3) of the Civil Law Act 1956 will not prevent an assignee from proceeding with its action on the basis that it H is an equitable assignee.

[37] I agree with the Court of Appeal that based on the facts and circumstances of the instant case, there was a valid equitable assignment of the monies in the sinking fund to the first respondent. The other issue for determination is whether the payment out of the monies by the appellant I from the sinking fund to the second respondent was a good satisfaction of the claim of the first respondent. This issue will be dealt with later.

Whether The Appellant Had Knowledge Of The Assignment

[38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1).

[39] The learned trial judge made a finding that the appellant was in possession of the deed of assignment, the power of attorney and the directors' resolution dated 20 May 2005. The deed of assignment and the power of attorney dated 19 September 2003 were made by the second respondent for the purpose of assigning the three projects to the first respondent. The company's resolution dated 20 May 2004 was for the purpose of adding another signatory to second respondent's account in the appellant's bank. In coming to that decision, the learned trial judge accepted the evidence of PW1, the director of the first respondent and rejected the evidence of DW1, the officer of the appellant.

[40] In affirming that finding, the Court of Appeal had this to say:

> [15] We have scrutinised the evidence on record. In our view, SP1's oral evidence is sufficient to show that the 1st defendant was aware of the assignment. SP1 testified that he had personally delivered both the deed of assignment and the power of attorney to SD1. SD1 had informed SP1 that there was no necessity for the bank to issue an acknowledgment receipt. The learned trial judge preferred the evidence of SP1's to that of SD1. Her Ladyship found that it was improbable for SD1 to claim ignorance of the documents when SD1 was the personnel responsible for the loan facilities and all related matter since 10.6.2002.
>
> [16] We have no doubt that the change of signatory in 2004 was clearly based on the deed of assignment. The 2nd defendant had instructed the 1st defendant by letter dated 20.5.2004 to add one Amiruddin bin Ahmad as second signatory for the current account. The 1st defendant's office memorandums dated 25.6.2003, 15.8.2003 and 19.8.2003 respectively were addressed to Amiruddin. All these documents and the circumstances were sufficient to refute the 1st defendant's allegation that the bank/1st defendant was never aware of the deed of assignment. The 1st defendant, at all material times, had constructive knowledge that the monies in the sinking fund had been assigned to the plaintiff and the money belonged to the plaintiff.

[41] In his submission, learned counsel for the first respondent referred to exhs. P10, P11 and P12 (being the internal office memoranda of the appellant and addressed to its Manager in Kuantan) which referred to the assignment of the contract in its heading, which meant that the appellant was clearly aware of the assignment of the contract.

[42] Based on the evidence available, I cannot find any reason to disagree with the findings of the High Court and the Court of Appeal that the appellant had knowledge of the assignment of the contracts by the second respondent to the first respondent. The finding was supported by credible evidence.

Whether The Appellant Was Liable To First Respondent

[43] The other issue to be dealt with is the appellant's contention that based on the decision of this court in *CIMB Bank Bhd*, it is insufficient for the appellant to be held liable to the first respondent based on the imputed constructive knowledge of the assignment because case law requires "dishonesty" on the appellant's part according to the test laid down in *Twinsectra v. Yardley* [2002] 2 All ER 377 in order for the appellant to be liable for the debt under the assignment.

[44] In *CIMB Bank Bhd*, the Federal Court held that CIMB Bank was not liable to Maybank trustee as a constructive trustee even when CIMB Bank knew of the assignment of the proceeds to Maybank trustee because CIMB Bank was not dishonest in allowing Pesaka Astana (M) Sdn Bhd, its customer, to withdraw monies from its account.

[45] It is therefore useful to reproduce paras. 146 to 148 of the judgment of the Federal Court in *CIMB Bank Bhd* for the purpose of this judgment.

> [146] In a gist, a new test was introduced by *Twinsectra*, in that the concept of subjective dishonesty became a requirement in a breach of trust situation. Lord Hoffman at p 382 in this case opined:
>
> > I do not think that it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.

[147] Lord Hutton at p 384 had added:

> Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'.

[148] Having scrutinised the evidence, we are satisfied that what was adduced before the court was merely evidence pointing to CIMB complying with the instructions given by the banker-customer relationship. In light of the peculiar position of CIMB, and with no cogent evidence having been adduced to say otherwise, it is our view that CIMB could not be construed as being dishonest in the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when transferring the monies to other accounts. This finding and conclusion therefore would be in line with the combined tests of an objective and subjective test as propounded by *Twinsectra*.

[46] The Court of Appeal just brushed aside the issue by saying that *CIMB Bank Bhd* was decided "in the parameters of its own set facts" and then the Court of Appeal said:

> [21] In this instant appeal, the 1st defendant's conscience could not be said to be clear. To begin with, the 1st defendant had all prior knowledge about the assignment. By closing the sinking fund account, the 1st defendant had deprived plaintiff of its interest and was liable for breach of trust.

[47] With respect, I do not think that the Court of Appeal was correct in arriving at its decision on the issue of dishonesty based on the combined test as profounded by *Twinsectra*. As stated by Lord Hoffman in *Twinsectra*, it requires more than knowledge of facts to make the conduct wrongful. It requires a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behavior. The appellant merely acted in accordance with the normal banker–customer relationship when it closed the sinking fund and paid the monies to the second respondent. Without other evidence, I am unable to say that the appellant was dishonest based on the ordinary standards of reasonable and honest people, with itself knowing, based on the subjective dishonest test, that what it did was dishonest when closing the sinking fund and paid the monies to the second respondent.

A

Conclusion

[48] For the reasons given above, my answer to the first question of law posed is in the affirmative. For the second question, my answer is in the negative as it has not been shown that the payment of the monies to its customer was done dishonestly. With regard to the third question, I find it unnecessary to answer.

B

[49] In the result, the appeal is allowed with costs. The decisions of the courts below against the appellant are set aside.

[50] The learned Chief Judge of Malaya, and my learned sister and brother Zaharah Ibrahim and Balia Yusof Haji Wahi FCJJ have seen this judgment in draft and have expressed their agreement with it.

C

Abu Samah Nordin FCJ (dissenting):

[51] This is an appeal by CIMB Bank Bhd ("the appellant") against the decision of the Court of Appeal in affirming the decision of the Kuantan High Court. On 30 August 2012, the High Court allowed Sebang Gemilang Sdn Bhd's ("the first respondent") claims against the appellant for general damages for negligence, breach of trust and breach of contract. The first respondent's claims were based on a deed of assignment dated 19 September 2003 granted by Hamidi Tech Sdn Bhd ("the second respondent") to the first respondent.

D

E

Background Facts

[52] The second respondent was awarded three separate contracts by the Government of Malaysia to build and complete three projects in the State of Pahang, namely a Government clinic in Jengka 22, Maran; a school hostel and dining hall in Pekan and another school hostel and a dining hall in Kuala Lipis ('the projects').

F

[53] The second respondent had secured various banking facilities from the appellant in the form of bank loans, overdrafts and bank guarantees in order to part-finance the said projects. The banking facilities were subject, among others, to the following conditions:

G

(i) that all proceeds from the contracts shall be remitted into an escrow account at the appellant's branch in Kuantan;

H

(ii) 5% of every progress payment received shall be deposited with a sinking fund in the form of fixed deposit under lien to the appellant.

[54] The second respondent accepted the above-said terms and conditions and opened an escrow account, namely current account no. 06050011296058, at the appellant's branch in Kuantan.

I

[55] The second respondent proceeded with the construction of the said projects but was unable to complete them. Hence by a deed of assignment dated 19 September 2003, the second respondent absolutely assigned all its rights, titles and interests in the said projects to the first respondent in consideration of the first respondent agreeing to take over the projects at its own cost and expense and to contribute RM500,000 only to the second respondent. The second respondent had also assigned to the first respondent all monies and/or proceeds pledged to the appellant in relation to the said projects. To facilitate the execution of the terms and conditions under the deed of assignment, the second respondent had on the same date executed a power of attorney in favour of the first respondent. It is not in dispute that no notice in writing of the deed of assignment was given to the appellant. It is also not in dispute that 5% of every progress payment received had been deposited into the sinking fund.

[56] After the completion of the projects and the expiry of the liability period, the first respondent approached the appellant for the release of the monies in the sinking fund. The appellant however informed the first respondent that the sinking fund had been closed on 11 July 2005 and that the monies therein had been paid to the second respondent. Unfortunately, the first respondent had been unable to obtain any information on the monies in the sinking fund as the appellant refused to divulge the sum of monies paid to the second respondent and other details relating to the sinking fund.

[57] In November 2009, the first respondent commenced this action against the appellant and the second respondent. The first respondent (plaintiff in the High Court) pleaded several causes of actions, including breach of contract based on the deed of assignment, negligence, breach of trust and conspiracy to injure. Among others, the first respondent sought the following reliefs:

(i) Against the appellant

(a) discovery of the actual amount in the sinking fund and the amount released without knowledge, consent or signature of the first respondent;

(b) discovery of the person to whom the said sum was released;

(c) a claim for the amount that was released from the sinking fund;

(d) general damages for breach of contract;

(e) general damages for negligence;

(f) general damages for breach of trust.

(ii) Against the second respondent:

(a) discovery of the person to whom the amount in the sinking fund was released to;

(b) a claim for the amount released from the sinking fund;

(c) general damages for conspiracy to injure.

(iii) Against the appellant and second respondent:

(a) interest at 6% from the date of release of the said sum from the sinking fund;

(b) interest at 8% on general damages from the date of the commission of the respective torts against the first respondent; and

(c) interest at 8% from the date of judgment to the date of payment.

[58] The second respondent was not represented by solicitors in the High Court and did not give any evidence at the trial.

[59] The appellant, in its defence, denied any knowledge of the deed of assignment and claimed that it was never served with the deed of assignment. Therefore, there were no contractual relationships between the appellant and the first respondent. The appellant claimed that the sinking fund was for the purpose of additional security to the banking facilities granted to the second respondent which would be used to settle the loans if there were insufficient monies in the current account. The balance, if any, would be returned to the second respondent. The appellant's witness, DW1, testified that the monies in the sinking fund had been released to the second respondent on 11 July 2005 and that the sinking fund account was closed on the same day.

[60] The appellant also denied the first respondent's claims for damages for negligence, breach of trust and conspiracy to injure.

Trial At The High Court

[61] At the trial, the learned trial judge had to decide on three issues, namely, whether:

(i) the appellant had knowledge of the deed of assignment dated 19 September 2003;

(ii) the appellant had wrongfully released the monies in the sinking fund to Hamidi/second respondent; and

(iii) the first respondent was entitled to any damages.

[62] There were only two witnesses at the trial. The sole witness for the first respondent was its director, Mr Tok Kai Son (PW1). PW1 testified that he had met DW1 and personally handed over the deed of assignment and the

power of attorney to DWI. Abdullah Halim bin Ariffin (DWI), who was responsible for monitoring the second respondent's banking facilities right from the onset, gave evidence for the appellant. DW1 denied any knowledge of the deed of assignment and the power of attorney. But after being shown those documents, he took the position that they were irrelevant and not binding on the appellant. He even went to the extent of saying that he did not know nor ever met PW1. DW1 said that PW1's testimony that the latter had personally met and handed over the deed of assignment and power of attorney to him was a lie. The learned trial judge held that DW1 had knowledge of the deed of assignment and the power of attorney. Those documents were in fact in the appellant's possession. This finding of facts was based on the testimony of PW1 who said that he had met DW1 and personally handed the deed of assignment and the power of attorney to him. DW1 then informed PW1 that there was no need for any acknowledgment in writing.

[63] The learned trial judge held that the first respondent was entitled to the monies in the sinking fund under the terms of the deed of assignment, after the completion of the projects and expiry of the liability period. The learned trial judge found that the appellant was negligent and as a trustee of the monies in the sinking fund, the appellant had also acted in breach of trust when it wrongfully released the monies in the sinking fund to the second respondent.

[64] Accordingly the learned trial judge awarded the first respondent general damages as follows:

(i) RM500,000 as damages for negligence and breach of trust; and

(ii) RM100,000 as damages for breach of contract.

with interest thereon at 4% p.a from the date of the writ till full realisation.

The learned trial judge further ordered that an enquiry be held to determine the sum of monies in the sinking fund which was released without the knowledge of the first respondent and that they be paid to the first respondent.

Appeal To The Court Of Appeal

[65] The appellant, being aggrieved by the decision of the High Court, appealed to the Court of Appeal against the said decision. At the Court of Appeal, learned counsel for the appellant contended, as he did in the High Court, that there was no effective assignment binding on the appellant as the first respondent had not given any notice in writing of the said assignment as statutorily required by s. 4(3) of the Civil Law Act 1956: See *UMW*

Industries Sdn Bhd v. Ah Fook [1996] 1 CLJ 379. Therefore, the appellant who had no knowledge of the assignment, released the monies in the sinking fund to the second respondent at its request.

[66] The other main contention by the appellant was that it could not be faulted in releasing the monies in the sinking fund to the second respondent as it merely acted in the ordinary course of business based on banker-customer relationship. The appellant denied holding the monies as a constructive trustee and in any event, it should not be held liable as a constructive trustee for alleged breach of trust as it had not acted dishonestly in releasing the monies to the second respondent. Learned counsel relied on the decision of this court in *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169, which adopted the test in *Twinsectra Ltd v. Yardley and Others* [2002] UKHL 12. In the latter case, the House of Lords held that before a finding of accessory liability could be made against a defendant for assisting in the commission of a breach of trust, it must be established that the defendant had acted dishonestly.

[67] The Court of Appeal agreed with the appellant that there was no written notice of assignment under s. 4(3) of the Civil Law Act ('the Act'). But it held that the deed assignment was valid as an equitable assignment as the High Court had found, as a fact that the appellant had knowledge of the assignment. The validity of such equitable assignment is was not affected by any failure to comply with the requirements of s. 4(3) of the Act: See *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369.

[68] The Court of Appeal agreed with the High Court that this was a clear case of breach of trust committed by the appellant, when it released the monies in the sinking fund to the second respondent. The Court of Appeal was of the view that *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169 was decided in the parameters of its own facts and therefore distinguishable. The appellant's conscience could not be said to be clear as it had prior knowledge of the assignment. By closing the sinking fund account, the appellant had deprived the first respondent of its interest and was liable for breach of trust.

[69] On 6 January 2014 this court granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions of law:

(a) Where there is no written notice of an absolute assignment pursuant to s. 4(3) of the Civil Law Act 1956, is the debtor liable to the assignee for the debt under the assignment;

(b) Where there is no written notice of an absolute assignment pursuant to s. 4(3) of the Civil Law Act 1956, and the trial court make a finding that the debtor has knowledge of an assignment between its customer and third party, can the debtor be held liable to that third party for the debt where the debtor has made payment of the same to its customer;

(c) Where the creditor has assigned the benefit of funds in a fixed deposit account to a third party, can mere knowledge of the identity of the signatories to a current account, constitute notice of an assignment to the debtor.

Submissions At The Federal Court

[70] The crux of the submission of learned counsel for the appellant was that the appellant was not aware of the deed of assignment in question when the appellant paid the monies in the sinking fund to the second respondent in its ordinary course of business of banker-customer relationship. Any payment after assignment without notice is a good payment as against the transferee: (*Jones v. Gibbons* 9 Ves 410; *In re Lord Southampton's Esate, Allen v. Lord Southampton* [1880] 16 Ch. D 178).

[71] It was also contended that the Court of Appeal erred in relying on the appellant's internal memorandums dated 25 June 2003, 15 August 2003 and 19 August 2003 in concluding that the appellant had constructive knowledge that the monies in the sinking fund had been assigned to the first respondent. Aminuddin referred to in the memorandums was a CIMB staff and not Amiruddin bin Ahmad who was a signatory to the second respondent's current account.

[72] The other contention of the appellant was that it could not be held liable as a constructive trustee even if it knew of the assignment without a finding by the court that the appellant was dishonest or had acted dishonestly in releasing the monies to the second respondent, citing *C1MB Bank Bhd v. Maybank Trustees Bhd & Other Appeals* [2014] 3 CLJ 1; [2014] 3 MLJ 169 and *Twinsectra Ltd v. Yardley and Others* [2002] 2 All ER 377, as authorities for such proposition.

Decision

[73] It must be borne in mind that all the three questions of law for the determination of this court are in relation to the deed of assignment dated 19 September 2003. The first question of law is whether the debtor (the appellant) is liable to the assignee (the first respondent) where there is no written notice of absolute assignment given to the appellant pursuant to s. 4(3) of the Act. It was submitted that the appellant was not liable to the first respondent as there was no notice of the assignment in writing to the appellant as required by s. 4(3) of the Act. It was only obliged to pay the monies to the first respondent if it had written notice of the said assignment.

[74] Section 4(3) of the Act deals with what is known as statutory or legal assignment. The assignment in the instant appeal does not qualify as a statutory assignment under s. 4(3) of the Act as no notice in writing of the said assignment was given to the appellant. But that does not make the assignment void.

[75] Section 4(3) of the Act is similar to s. 136(1) of the English Law of Property Act 1925. *Anson's Law of Contract*, 28th edn. at p. 475 opined that an assignment without notice under s. 136(1) of the Law of Property Act may still be a perfectly good and valid equitable assignment. In *William Brandt's Sons & Co v. Dunlop Rubber Co Ltd* [1905] AC 454, Lord Macnaghten, in referring to s. 25(6) of the Judicature Act 1873 said that the statute does not forbid or destroy equitable assignment or impair their efficacy in the slightest degree. Section 25(6) of the Judicature Act 1873 was later repealed and replaced by s. 136(1) of the Law of Property Act 1925.

[76] The brief facts in *William Brandt*'s case are these. Merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by a remittance direct from the purchasers to the bank. Goods having been sold by the merchants the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase money and requested the purchasers to sign an undertaking to remit the purchase money to the bank.

[77] The purchase money was not paid to William Brandt's (the bank). William Brandt's sued Dunlop Rubber Company Ltd (purchasers) for the amount due contending that there was an absolute assignment or alternatively an equitable assignment. Walton J held in favour of the plaintiffs. The Court of Appeal dismissed the action with cost, holding that the notice to the purchasers was not an absolute assignment under s. 25(6) of the Judicature Act 1873, without giving due consideration to the claim based on equitable assignment. The plaintiffs appealed to the House of Lords, which set aside the decision of the Court of Appeal and reinstated Walton J's decision. The House of Lords found that there was evidence of an equitable assignment. Lord Macnaghten at p. 462 of the judgment said:

> An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of a mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril.

[78] *Halsbury's Law of England*, 5th edn. at para 24, under the heading 'Equitable Assignment', pointed out that courts of equity have always permitted and given effect to assignments of all kinds of choses or things in action when the assignment is made for valuable consideration and is not contrary to public policy.

[79] Malaysian courts do recognise equitable assignments. Thus in *Public Finance Bhd*'s case, this court held the view that an assignment without written notice under s. 4(3) of the Act may still be valid as an equitable assignment. The validity of such equitable assignment is not affected by any failure to comply with the requirements as laid down in s. 4(3) of the Act. Equity stepped in and allowed such assignment of contractual rights, such as debts, to another person who is not privy to the contract in respect of such rights, without at all the consent of the debtor.

[80] In my view, the Court of Appeal was right, following the decision in *Public Finance Bhd*'s case, in holding, as the High Court did, that the deed of assignment was valid as an equitable assignment and the absence of notice in writing as required by s. 4(3) of the Act did not affect its validity.

[81] The pertinent question to ask is at what point in time the assignment can be held to be binding on the appellant? It must be from the time it had notice of it. The appellant cannot be held liable if it had no notice at all of the said assignment. For the assignee's title to be effective against the debtor, notice must therefore be given, though no consent or acquiescence on the part of the debtor is necessary: See *Halsbury's Laws of England*, 28th edn. para 41. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor: See *Public Finance Bhd*'s case.

[82] In this case, the High Court had made a finding of fact, which was affirmed by the Court of Appeal that the appellant had knowledge of the deed of assignment. As such, the appellant should not have paid out the monies in the sinking fund to the second respondent, in breach of the assignment. The evidence from PW1 was very clear. He testified that he met DW1 at the latter's office and personally gave the deed of assignment to him. DW1 denied the evidence given by PW1. The trial judge believed PW1's evidence. I am of the opinion that, in the circumstances of this case, the deed of assignment which was personally given by PW1 to DW1 was valid as an equitable assignment. The absence of notice of assignment in writing as required by s. 4(3) of the Act does not affect its validity. Lord Macnaughten in *William Brandt*'s case, aptly said:

> All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If he ignores such a notice, he does so at his peril.

[83] *Halsbury's Laws of England*, 28th edn, at paras. 28 and 47 had this to say:

> 28. No form of words is required for an equitable assignment; the only thing that is necessary is to make the meaning plain. The assignment may be by words of mouth, unless in the particular case writing is required by law, and no particular form of words is necessary so long as the words clearly show an intention that the assignee is to have the benefit of the chose or thing in action.
>
> 47. Except in cases where writing has been made necessary by statute, it is not necessary that a formal notice of assignment of a chose or thing in action be given. Any informal notice is sufficient, provided the fact of the assignment is definitely brought to the mind of the debtor or fund holder ... It is sufficient to show that the debtor has had knowledge of the assignment, regardless of the source or mode of his knowledge.

[84] Thus, the answer to the first question is in the affirmative. An assignment without written notice under s. 4(3) of the Act in the circumstances in this case is valid as an equitable assignment and binding on the appellant.

[85] The second question of law is whether the debtor, in absence of a written notice under s. 4(3) of the Act, can be held liable to the third party (the first respondent) for the debt where the debtor had knowledge of the assignment but had however made the payments to its customer (the second respondent). The debtor here is the appellant.

[86] Learned counsel for the appellant's contention here is twofold. First, mere knowledge alone is not sufficient to attach liability on the appellant. Secondly, the payment by the appellant to the second respondent was made before it had knowledge of the assignment. Before us, learned counsel conceded that the appellant had knowledge of the assignment but contended that there was no evidence when the assignment was served on the appellant. It was the appellant's contention that the monies in the sinking fund had been released to the second respondent before the appellant had knowledge of the deed of assignment.

[87] This contention is without merit. It is a question of fact when payment was made. The trial court had made a specific finding of fact that the appellant had knowledge of the deed of assignment and had it in its possession before the monies in the sinking fund were released to the second respondent.

[88] The deed of assignment is dated 19 September 2003. As at that date, the projects had not been completed. It was the first respondent who took over and completed the projects. The appellant continued to deduct 5% of every progress payment after the first respondent took over the projects. That was very obvious and not denied, as the appellant had in its defence stated that it had subsequently released the monies to the second respondent. This must be the surplus monies after deduction of any outstanding sums owed by the second respondent. It is not the appellant's defence that there was no monies in the sinking fund. The Court of Appeal therefore did not err in affirming the decision of the trial court. There are no valid reasons to interfere with the finding of the trial judge.

Breach Of Trust

[89] With regard to the issue on breach of trust, it was the appellant's submission that it could not be held liable as a constructive trustee even if it knew of the assignment, unless it could be established on evidence that the appellant was dishonest in releasing the monies in the sinking fund to the respondent; dishonesty being, it was contended, a necessary ingredient to be proved before a person could be held liable as a constructive trustee. Learned counsel for the appellant relied on *Twinsectra Ltd v. Yardley and Others*, and *CIMB Bank Bhd v. Maybank Trustee and Other Appeals*, in support of his submission. In my view, *Twinsectra Ltd*'s case can be easily distinguished. It was a case on accessory liability. The House of Lords in that case held that a finding of accessory liability could only be made against the defendant if it was established on the evidence that he had been dishonest. In the instant appeal, the first respondent's pleaded case was that the appellant was a trustee of the monies in the sinking fund. As I understand, it *Twinsectra Ltd*'s case is not an authority that before a trustee or constructive trustee can be held liable, it must first be established that the trustee or the constructive trustee was dishonest.

[90] It seemed that the principles of law on the liability of an accessory to a breach of trust by a trustee or fiduciary as laid down in *Twinsectra Ltd*'s case had been expanded in *CIMB Bhd v. Maybank Trustees Bhd and Other Appeals* to apply to a constructive trustee. Perhaps unintentionally. In that case, the bondholders who bought the Islamic bonds from Pesaka Astana (M) Sdn Bhd ("Pesaka') sued several defendants, including Maybank Trustees Bhd (MTB) when Pesaka Astana (M) Sdn Bhd defaulted and failed to redeem the bonds and pay the bondholders on maturity date.

[91] The bondholders' case against MTB was based on a trust deed entered into by Pesaka with MTB and not based on assignment. Under the terms of the trust deed, Pesaka appointed MTB as the sole trustee to manage and

control certain designated accounts to be opened by Pesaka at CIMB. Pesaka was required to deposit the bondholders, funds in the designated accounts in order to protect the interests of the bondholders.

[92] As it turned out, instead of opening new designated accounts, Pesaka used its existing accounts with CIMB as the designated accounts. MTB was never made the sole signatory to these accounts and therefore had no control over the designated accounts. This enabled Pesaka to utilise the monies in the designated accounts for its own purposes, instead of using them to redeem the bonds on maturity date. MTB was held liable for breach of contract and negligence.

[93] MTB, in turn, filed a counterclaim against CIMB for negligence and breach of trust as a constructive trustee in respect of funds in the designated accounts maintained by Pesaka with CIMB. The High Court dismissed the counterclaim, holding that there was no duty owed to MTB and that CIMB had not, on evidence, being dishonest; dishonesty being, it was held, a necessary ingredient to be proved for breach of trust committed by a constructive trustee. The Court of Appeal however allowed the counterclaim, holding that CIMB owned a duty to MTB as a constructive trustee. CIMB then appealed to the Federal Court.

[94] In the Federal Court, the question of law for its determination was whether CIMB was liable as a constructive trustee to MTB for monies in the designated accounts maintained by Pesaka in CIMB? The Federal Court allowed CIMB's appeal holding that on evidence CIMB merely acted on instructions of the client on the basis of banker-customer relationship with respect to disposals of monies in the designated accounts and its actions could not be construed as being dishonest.

[95] The Federal Court in allowing CIMB's appeal, adopted the combined test propounded in *Twinsectra Ltd*'s case. It quoted what Lord Hutton at para. 147 said:

> Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'.

[96] In addition, the Federal Court also quoted a passage from the judgment of Lord Hoffman. This is what the Federal Court at para. 146 of its judgment said:

> [146] In a gist, a new test was introduced by *Twinsectra*, in that the concept of subjective dishonesty became a requirement in a breach of trust situation. Lord Hoffman at p. 382 in this case opined:

> I do not think that it is fairly open to your Lordships to take this view of the law without departing from the principles laid down by the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378. For the reasons given by my noble and learned friend, Lord Hutton, I consider that those principles require more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour. I also agree with Lord Hutton that the judge correctly applied this test and that the Court of Appeal was not entitled, on the basis of the written transcript, to make a finding of dishonesty which the judge who saw and heard Mr Leach did not.

[97] The Federal Court in MTB's case was also of the view that the combined test in *Twinsectra Ltd*'s case was an extension of the principle relating to dishonest assistance as propounded in *Royal Brunei Airlines*'s case.

[98] I have read and reread the above cases. As I understand it, these two cases are not authorities for the proposition that before a constructive trustee can be held liable for a breach of trust, it must be established, on evidence that the constructive trustee was dishonest. The principles of law as laid down in these cases was in respect of accessory liability. What Lord Hoffman and Lord Hutton said, in the passages as quoted in MTB's case was made in the context of liability of an accessory to a breach of trust by a trustee or fiduciary.

[99] Lord Hoffman, at para. 11 of his judgment clearly said:

> 11 ... The basis of the claim was that the payment by Sims to Mr. Leach in breach of the undertaking was a breach of trust and that he was liable for dishonestly assisting in the breach of trust in accordance with the principles stated by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97, [1995] 2 AC 378.

[100] In *Royal Brunei Airlines*'s case, the defendant, Tan was sued as an accessory to the trustee. He was a director and a majority shareholder of Borneo Leisure Travel Sdn Bhd (BLT), who was the trustee in that case. The Privy Council held BLT liable as an accessory. The headnote at p. 97 reads:

> A person who dishonestly procured or assisted in a breach of trust or fiduciary obligation was liable in equity to make good any resulting loss and although dishonesty was both a necessary and a sufficient ingredient of accessory liability the breach of trust which was a prerequisite for accessory liability need not itself be a dishonest and fraudulent breach of trust by the trustee. Accordingly, in order for liability to attach to the accessory it was not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this would usually be so where the third party who was assisting him was acting dishonestly.

[101] What did Lord Nicholls actually say in *Royal Brunei Airlines*'s case? This is what Lord Nicholls at p. 109 said:

> Drawing the threads together, their Lordships overall conclusion is that dishonesty is a **necessary ingredient of accessory liability.** It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who **dishonestly procures or assists in a breach of trust of fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly,** although this will usually be so where the third party who is assisting him is acting dishonestly. (emphasis added)

[102] In *Twinsectra Ltd*'s case, the House of Lords was obviously dealing with the law on accessory liability. In that case, L, was a solicitor who acted for Y in a transaction which included the negotiation of a loan of £1 m from the respondent lender. L did not deal directly with the lender, and another firm of solicitors, S, represented themselves as acting on behalf of Y. They received the money in return for an undertaking that the money would be retained until such time as it was applied in the acquisition of the property on behalf of Y and that it was to be utilised solely for that purpose. Contrary to the term of the undertaking, S, did not retain the money but instead paid it to L. In his turn, L paid out upon Y's instruction to S. As a result, Y used almost £358,000 for other purpose. The loan was not repaid and the lender, *inter alia*, sued L, contending that the payment by S to L in breach of the undertaking was a breach of trust and that L was liable for **dishonestly assisting in the breach of trust** (emphasis added). The trial judge held, on evidence, that L had not been acting dishonestly because he had believed that he was holding the money to Y's order without restriction. The Court of Appeal reversed the decision and held L liable. The House of Lords, by majority decision, allowed the appeal and restored the decision of the trial judge. The House of Lords held (Lord Millet dissenting):

> For the purposes of accessory liability for breach of trust, a defendant would not be held to be dishonest unless it was established that his conduct had been dishonest by the ordinary standards of reasonable and honest people and that he himself had realised that by those standards his conduct was dishonest ... It followed in the instant case that a finding of accessory liability could only be made against L if applying the combined objective and subjective test, it was established on the evidence that he had been dishonest.

The House of Lords held that the Court of Appeal was wrong in reversing the finding of fact by the trial judge who had the advantage of seeing the party giving evidence in the witness box.

[103] The Privy Council in *Barlow Clowes International Ltd (in liquidation) and Others v. Eurotrust International Ltd and Others* [2006] 1 All ER 333 had occasion to deliberate on the principles of law on accessory liability which had been decided in *Brunei Airlines*'s case and *Twinsectra Ltd*'s case. In that case, the plaintiff sued against Peter Henwood and Andrew Sebastian, the principal directors of International Trust Corporation (ITC) alleging that they had dishonestly assisted in the misappropriation of investors' fund. The judge at first instance proceeded on the basis that liability for dishonest assistance required a dishonest state of mind on the part of the person who assisted in a breach of trust. On the evidence, the judge found the defendants liable for dishonestly assisting in the misappropriation of a number of sums. Mr Sebastian appealed on limitation point and his appeal was dismissed. Mr Henwood appealed to the Staff of Government Division of the High Court against the finding that he had given dishonest assistance to ITC. The appeal was allowed. The plaintiff then appealed to the Privy Council, which allowed the appeal and restored the finding of the court of first instance. The Privy Council agreed with the decision of the court of first instance that the liability for dishonest assistance required a dishonest state of mind on the part of the person who assisted in breach of trust. The Privy Council found that the judge had correctly applied the law on accessory liability as propounded in *Royal Brunei Airlines*'s case.

[104] Thus, in my considered view, learned counsel's reliance on *Twinsectra Ltd*'s case and *Maybank Trustee Bhd*'s case as authorities, that before there can be a finding of liability on the constructive trustee it must be established, on evidence, that the constructive trustee was dishonest, is misguided and untenable in law.

[105] It must be noted that the three questions of law before us are strictly on the assignment and whether such assignment is valid in absence of written notice under s. 4(3) of the Act; and where no written notice is given, whether the appellant can he held liable to a third party (first respondent) upon a finding by the trial court that the debtor (appellant) had knowledge of it although it had paid the monies to its customer (second respondent); and lastly whether mere knowledge of the identity of the signatories to a current account can constitute notice of an assignment to the debtor. The submission that there must be evidence of dishonesty before a constructive trustee can be held liable is wholly irrelevant to the questions put to this court.

[106] It must also be noted that the appellant's submission that it could not be held liable in absence of a finding of dishonesty was only confined to the first respondent's claims against the appellant as a constructive trustee for breach of trust. Thus, even if the appellant succeeds on this issue, it does not absolve the appellant from liability for negligence in releasing the monies in the sinking fund to the second respondent.

Therefore, the answer to the second question is in the affirmative, notwithstanding that payment had been made by the debtor to its customer. A debtor who makes payment to a third party after having knowledge of the assignment does so at his own peril.

[107] The third question posed to this court is hardly a question of law. The question is whether mere knowledge of the identity of the signatories to the second respondent's current account can constitute notice of an assignment to the debtor (the appellant). It appeared to me that this question is based on the assumption that the only evidence available against the appellant was that it knew of the identity of the signatories to the current account.

[108] That is not so. The primary evidence against the appellant came from PW1 who testified that he had personally handed over the assignment to DW1. DW1 denied it. But the learned trial judge, who had the advantage of hearing and seeing the witnesses testifying before her, preferred to accept the evidence of PW1 and accordingly made a definitive finding of fact that the appellant had knowledge of the assignment and had in its possession a copy of the assignment. Hence it is not necessary to answer the third question as it would not affect the outcome of the appeal.

[109] For the aforesaid reasons, the appeal by the appellant is dismissed with the costs.